

**Tan Kim Hor & Ors v Tan Heng Chew & Ors****A**

HIGH COURT (KUALA LUMPUR) — COMPANY WINDING UP NO D2-28-507 OF 2001

ZAINUN ALI J

9 OCTOBER 2001

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*Companies and Corporations — Winding up — Just and equitable grounds — Stand off between major shareholders — Breakdown in relationship of mutual trust and confidence — Exercise of court's inherent jurisdiction to strike out petition — Petitioner showed careless disregard of interests of shareholders, whether amounted to bad faith — Petitioners involved in active management of company, whether oppression against petitioners proved — Companies Act 1965 s 218(1)(i)*

**C**

Tan Chong & Co was founded in the early 1930's by Tan Chong who was the patriarch of the Tan Chong family as a sole proprietorship. It was in or around 1946 that the partnership of Tan Chong & Co ('TC & Co') as food supplier was founded, where the partners in the business were Tan Chong, the first petitioner (Tan Chong's eldest son) and Tan Sri Tan Yuet Foh (who was the father of the first respondent). The company subsequently diversified into car distributorship business and on 16 February 1959, Tan Chong & Sons Motor Co ('TCM') was incorporated, where the Tan Chong siblings were the subscribers and directors. TCM handled the motor business and TC & Co, the business of food supply. According to the first petitioner, much of the business of the two companies, were conducted informally and on a consultative basis among family members. The car business expanded and saw remarkable forays into other areas, which necessitated the incorporation of the companies. The expansion of the business led to the natural progression of the company going public. However to ensure that the Tan Chong family would remain in control of the business, the Tan Chong family was to hold a controlling block of shares in a newly incorporated public listed company where the shareholders of the investment holding company would comprise entirely of the members of the Tan Chong family. This would essentially enable the Tan Chong family members to be majority shareholders in the public listed company. Thus, Tan Chong Motor Holdings Bhd ('TCMH') was incorporated on 4 October 1972 and subsequently converted into a public company on 1 September 1973. The ninth respondent, ie, Tan Chong Consolidated Sdn Bhd ('the ninth respondent company') was incorporated on 7 June 1973 as the investment holding company, formed for the purpose of holding the Tan Chong family's controlling block of shares in TCMH. The first subscribers and directors of the ninth respondent company were Tan Yuet Foh and the first petitioner. Form 24 of the ninth respondent company as at 16 June 1973 denoted the 50:50 shareholding of both families. However, it would be seen that on 16 June 1973, the ninth respondent company resolved to purchase 9,230,000 shares of RM1.00 each in TCMH out of which 5,115,000 were purchased from Tan Yuet Foh and 4,115,000 were purchased

**D****E****F****G****H****I**

- A** from the first petitioner. On 28 August 1974, the ninth respondent company allotted for cash 3,230 shares of RM1.00 each of which 1,115 in total were issued to members of the first petitioner's family and 2,115 were issued to members of Tan Yuet Foh's family. After the allotment on 28 August 1974, Tan Yuet Foh's family owned a total of 5,115,000 shares in the ninth respondent company and the first
- B** petitioner's family owned a total of 4,115,000 shares in the ninth respondent company, ie, in the ratio of 55.417% held in the Tan Yuet Foh's family and 44.583% held by the first petitioner's family. This proportion was maintained from 28 August 1974 until the present day. When Tan Yuet Foh passed away on 8 October 1985, his eldest
- C** son, the first respondent (Tan Heng Chew), took over his role as head of the Tan Yuet Foh's family. Both sets of families continued to work and existed side by side in the family company. Further developments in the family business saw efforts made by the first respondent to reorganize the family business, ie, the de-merger of TCMH into diverse activities so as to rationalize operations. The de-merger
- D** exercise took months to structure. Just before the EGM of 11 September 1999 it had then reached a crucial point where the ninth respondent company as the single biggest shareholder in TCMH was required to confirm its participation. By then, the familial surroundings had culminated in a 'stand-off' between the first petitioner and the first respondent. In the instant petition, the
- E** petitioner sought to wind up the ninth respondent company pursuant to s 218(1)(i) of the Companies Act 1965 on the 'just and equitable' ground. The petitioner sought equitable relief and the petition was premised primarily upon a breakdown in the relationship of mutual trust and confidence between the two factions, ie, the respective families of both the petitioners and the respondents.
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**Held**, striking out the petition with costs:

- G** (1) The power of the court to strike out a petition to wind up a company lies in the inherent jurisdiction and not in O 18 r 19 of the Rules of the High Court 1980 although judicial differences had been expressed over this legalese. The court had inherent jurisdiction to strike out a petition that amounted to an abuse of the court's process (see p 235F-G).
- H** (2) The first petitioner had suffered from a bad case of petulance and peevishness. This had led to his mulish resistance to agree to sign the circular resolution to approve the de-merger, despite the serious consequences to the company and the shareholders, should it not go through. In this, the court found that the first petitioner had acted unreasonably, not least when for good measure, an ultimatum was delivered, as when the petitioners indicated they would only sign if the respondents agree to their
- I** proposal to restructure the company which included liquidation and joint management of the group (see p 237F-H).

- (3) This wanton conduct smacked of unreasonableness since there were shareholders in the listed company whose interests would be jeopardized in the event the de-merger was aborted. The courts would look askance at situations where careless disregard was shown to the interests of shareholders (see p 237H-I); *Re A Company* [1992] BCLC 701; *Charles Forte Investments Ltd v Amanda* [1964] 1 Ch 240; *Re Semantan Estate (1952) Ltd* [1952] MLJ 285 followed. **A**
- (4) The first petitioner's letter of 7 September 1999 showed just how far the petitioners were prepared to put their own selfish interest to wind up the company of the interests of the Tan Chong Holdings Bhd Group and all its public shareholders as well as the interest of the ninth respondent company and its shareholders as a whole. Thus bad faith was clearly shown (see p 238A-B) **B**
- (5) The complaints were exclusively made against the first respondent alone and did not involve other respondents. In order to support a winding up petition, the petitioners needed to show that the relationship between all the shareholders had broken down and not just that they disagreed with one or two of them. The tenacity of the petitioners in wanting a winding up on account of an irretrievable breakdown of 'mutual trust and understanding' between them and the respondents, was diluted, when in the next minute, petitioners were heard to have indicated that they had no problem working together with the respondents after the split. The court had difficulty in comprehending this rather perverse logic, since this translated into a situation where there could not possibly be such an irretrievable breakdown, if the parties could still work together (see p 238C-F). **C**
- (6) There seemed to be a collateral purpose and bad faith in the petitioner's petition. In the instant case, the petitioners seemed determined at all costs, to wind up the company, even at the expense of not disclosing to the court the fact that the first to 8th petitioners all hold senior positions within Tan Chong Group, including Chairmanship of two public listed companies and Managing Director, Deputy Managing Director and General Manager of key subsidiaries. It was a fact that none of the petitioners had been removed from any executive position. In fact the petitioners held more keys positions throughout the Tan Chong Group than the respondents and the first petitioner was still very much a cheque signatory. The petitioner's failure to disclose these and their majority on the Board of Management of the company amounted to an abuse of process (see pp 238F-239A). **D**
- (7) Given their desire to 'unlock' themselves from their minority position, it appeared mystifying that the petitioners, acted in an extraordinary way to the respondent's offer to buy their shares at fair market value, viewing it as 'offensive' and 'insulting'. The court noted that since the petitioners seemed all geared to part **E**
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- A** company with the respondents, a share buy-out would have been one way of ensuring that they were not locked-in. Rejecting the respondent's offer was one thing, but to then counter-offered to buy the respondent's shares, was somehow reflective of an undisclosed motive. It was also strange that the petitioner found it a perfectly acceptable conduct for them to do the very thing they
- B** accused the respondents of doing (see p 239B–C).
- (8) It was inconceivable how the first petitioner could ever begin justifying that the petitioners were oppressed and denied participation in the affairs of the ninth respondent company when the petitioners and several of their family members were actively
- C** involved in the management of the ninth respondent company (see p 239F–G).
- (9) In truth, what the first petitioner found galling was to be outvoted on most counts. Thus, the only thorn in the flesh was that the respondents were in effective control by virtue of their collective shareholding, whilst the petitioners were not, and this fact struck at the very heart of the petition. The first petitioner's maudlin preoccupation with tradition and remembrance of things past, got in the way of the practical, pragmatic corporate governance of the day. As was obvious, to present a winding up petition was a most serious matter. In these circumstances, it was the court's view that if the petition could be shown to be manifestly unsustainable even at the interlocutory stage, the court should not allow it to languish even a day longer, but instead should strike it off as early as possible (see pp 239H–240A).
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**F** **[Bahasa Malaysia summary]**

Tan Chong & Co diasaskan pada awal tahun 1930an oleh Tan Chong yang merupakan ketua keluarga Tan Chong, sebagai suatu perniagaan tunggal. Pada atau sekitar tahun 1946 perkongsian Tan Chong & Co ('TC & Co') sebagai pembekal makanan diasaskan, yang mana pekongsi-pekongsi dalam perniagaan tersebut adalah Tan Chong, pempetisyen pertama (anak lelaki sulung Tan Chong) dan Tan Sri Tan Yuet Foh (yang merupakan bapa penentang pertama). Syarikat tersebut kemudiannya menjalankan kepelbagaian sehingga ke dalam bidang perniagaan pengedaran kereta, dan pada 16 Februari 1959, Tan Chong & Sons Motor Co ('TCM') diperbadankan, di mana adik-beradik Tan Chong adalah penyumbang dan pengarah. TCM mengendalikan perniagaan motor dan TC & Co, perniagaan pembekalan makanan. Menurut pempetisyen pertama, sebahagian besar perniagaan kedua-dua syarikat tersebut dijalankan secara tidak rasmi dan atas dasar perundingan di kalangan ahli-ahli keluarga. Perniagaan dalam kereta telah diperluaskan dan memperlihatkan penglibatan dalam bidang lain, yang menghendaki perbadanan syarikat-syarikat tersebut. Perleluasan perniagaan tersebut membawa

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kepada perkembangan syarikat tersebut menuju terhadap daftar awam. Namun demikian, untuk memastikan bahawa keluarga Tan Chong akan terus mengawal perniagaan tersebut, keluarga Tan Chong akan memegang blok saham mengawal dalam syarikat awam berdaftar yang baru diperbadankan yang mana pemegang saham syarikat pemegang pelaburan akan terdiri secara keseluruhannya daripada ahli-ahli keluarga Tan Chong. Ini akan membolehkan ahli-ahli keluarga Tan Chong untuk menjadi pemegang saham majoriti dalam syarikat awam berdaftar tersebut. Justeru itu, Tan Chong Motor Holdings Bhd ('TCMH') diperbadankan pada 4 Oktober 1972, pertamanya sebagai syarikat persendirian dan kemudiannya diubah kepada syarikat awam pada 1 September 1973. Penentang kesembilan, iaitu Tan Chong Consolidated Sdn Bhd ('syarikat penentang kesembilan') diperbadankan pada 7 Jun 1973 sebagai syarikat pemegang pelaburan, yang ditubuhkan dengan tujuan memegang blok saham mengawal keluarga Tan Chong dalam TCMH. Penyumbang dan pengarah syarikat penentang kesembilan merupakan Tan Yuet Foh dan pempetisyen pertama. Borang 24 syarikat penentang kesembilan pada 16 Jun 1973 menunjukkan pegangan saham dalam kadar 50:50 oleh kedua-dua buah keluarga. Walau bagaimanapun, boleh diperhatikan bahawa pada 16 Jun 1973, syarikat penentang kesembilan berazam membeli 9,230,000 saham bernilai RM1.00 setiap satu dalam TCMH yang mana 5,115,000 dibeli daripada Tan Yuet Foh dan 4,115,000 dibeli daripada pempetisyen pertama. Pada 28 Ogos 1974, syarikat penentang kesembilan memperuntukkan dalam bentuk tunai 3,230 saham bernilai RM1.00 setiap satu yang mana sebanyak 1,115 dikeluarkan kepada ahli-ahli keluarga pempetisyen pertama dan 2,115 dikeluarkan kepada ahli-ahli keluarga Tan Yuet Foh. Selepas peruntukan pada 28 Ogos 1974, keluarga Tan Yuet Foh memiliki saham sebanyak 5,115,000 dalam syarikat penentang kesembilan dan keluarga pempetisyen pertama memiliki saham sebanyak 4,115,000 dalam syarikat penentang kesembilan, iaitu, dalam kadar 55.417% dipegang dalam keluarga Tan Yuet Foh dan 44.583% dipegang oleh keluarga pempetisyen pertama. Kadar ini dikekalkan dari 28 Ogos 1974 sehingga kini. Apabila Tan Yuet Foh meninggal dunia pada 8 Oktober 1985, anak lelaki sulungnya, penentang pertama (Tan Heng Chew), mengambil alih sebagai ketua keluarga Tan Yuet Foh. Kedua-dua buah keluarga terus bekerja dan wujud bersampingan dalam syarikat keluarga. Perkembangan lanjut dalam perniagaan keluarga tersebut memperlihatkan percubaan oleh penentang pertama untuk menyusun semula perniagaan keluarga, iaitu, pemutusan penggabungan TCMH dalam pelbagai kegiatan untuk merasionalisasi operasi. Usaha pemutusan penggabungan telah mengambil beberapa bulan untuk disempurnakan. Sebelum EGM bertarikh 11 September 1999, ia telah mencapai tahap genting di mana syarikat penentang kesembilan sebagai pemegang saham yang paling besar dalam TCMH dikehendaki mengesah penyertaannya. Akan tetapi keadaan yang

- A** tidak menyenangkan tercetus, berakhir dalam satu 'stand-off' di antara pempetisyen pertama dan penentang pertama. Dalam petisyen ini, pempetisyen memohon supaya syarikat penentang kesembilan digulung menurut s 218(1)(i) Akta Syarikat 1965 atas alasan 'adil dan saksama'. Pempetisyen memohon relief ekuiti dan petisyen adalah berdasarkan utamanya pada keretakan dalam perhubungan saling percaya dan yakin di antara dua kelompok, iaitu keluarga masing-masing kedua-dua pempetisyen dan penentang.
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**Diputuskan**, membatalkan petisyen dengan kos:

- C** (1) Kuasa mahkamah untuk membatalkan suatu petisyen untuk menggulung sesebuah syarikat terletak dalam bidang kuasa sedia ada dan bukannya dalam A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi walaupun perbezaan kehakiman telah dinyatakan atas perkara ini. Mahkamah bersetuju bahawa ia mempunyai bidang kuasa sedia ada untuk membatalkan sesuatu petisyen yang berjumlah kepada penyalahgunaan proses mahkamah (lihat ms 235F–G).
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- (2) Adalah nyata bahawa pempetisyen pertama bersikap perongos dan mudah naik marah. Ini telah membawa kepada penentangannya untuk bersetuju menandatangani resolusi pekeliling supaya meluluskan usaha pemutusan penggabungan, sungguhpun ia akan memberi akibat buruk kepada syarikat tersebut dan pemegang sahamnya, sekiranya ia tidak diluluskan. Berhubung perkara ini, mahkamah mendapati bahawa pempetisyen pertama telah bertindak secara tidak munasabah, lebih-lebih lagi apabila kata dua telah dikeluarkan, di mana pempetisyen mengatakan mereka hanya akan menandatangani sekiranya penentang-penentang bersetuju kepada cadangan mereka untuk menyusun semula syarikat tersebut yang termasuk pembubaran dan pengurusan bersama kumpulan tersebut (lihat ms 237F–H).
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- (3) Sikap yang tidak berakhlak ini menonjolkan unsur-unsur ketidakmunasabahan memandangkan kepentingan sebilangan pemegang saham dalam syarikat didaftarkan tersebut akan terjejas sekiranya usaha pemutusan penggabungan diakhiri. Mahkamah akan memandang dengan sikap tidak bersetuju kepada keadaan di mana pengabaian cuai ditunjukkan terhadap kepentingan pemegang-pemegang saham (lihat ms 237H–I); *Re A Company* (1992) BCLC 701; *Charles Forte Investments Ltd v Amanda* [1964] 1 Ch 240; *Re Semantan Estate (1952) Ltd* [1952] MLJ 285 diikut.
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- (4) Surat pempetisyen pertama bertarikh 7 September 1999 menunjukkan betapa jauh pempetisyen bersedia memberi keutamaan kepada kepentingan diri mereka untuk menggulung syarikat tersebut daripada kepentingan Kumpulan Tan Chong Holdings Bhd dan semua pemegang saham awamnya serta juga
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kepentingan syarikat penentang kesembilan dan pemegang-pemegang saham pada keseluruhannya. Justeru itu niat buruk jelas kelihatan (lihat ms 238A–B).

- (5) Adalah nyata bahawa aduan-aduan dibuat secara khusus terhadap penentang pertama sahaja dan tidak melibatkan penentang-penentang lain. Untuk menyokong petisyen penggulungan, pempetisyen perlu menunjukkan bahawa perhubungan di antara pemegang saham telah menjadi renggang dan bukan sahaja mereka tidak bersetuju dengan salah satu atau dua daripada mereka. Keazaman para pempetisyen dalam menghendaki penggulungan berasaskan keretakan yang tidak boleh diperbaiki ke atas ‘mutual trust and understanding’ di antara mereka dan penentang-penentang adalah lemah sekali, walhal seminit selepas itu, para pempetisyen pernah didengar mengatakan bahawa mereka tidak mempunyai sebarang masalah bekerjasama dengan penentang-penentang selepas perpecahan. Mahkamah tidak faham logik yang agak terpesong ini, oleh kerana ini menimbulkan keadaan di mana tidak mungkin berlakunya keretakan yang tidak boleh diperbaiki sedemikian, sekiranya pihak-pihak terbabit masih boleh bekerjasama (lihat ms 238C–F).
- (6) Nampaknya ada tujuan berdampingan dan niat buruk dalam petisyen pempetisyen. Dalam kes ini, para pempetisyen seolah-olah berazam, dengan apa juga cara, untuk menggulung syarikat tersebut, biarpun sehingga tahap tidak memaklumkan kepada mahkamah hakikat bahawa pempetisyen pertama sehingga kelapan semuanya memegang jawatan kanan dalam Kumpulan Tan Chong, termasuk Pengerusi dua buah syarikat awam berdaftar dan Pengarah Urusan, Timbalan Pengarah Urusan dan Pengurus Am subsidiari-subsidiari utama. Ia merupakan satu hakikat bahawa tidak satu daripada para pempetisyen telah diusir daripada mana-mana kedudukan eksekutif. Sebenarnya, para pempetisyen memegang jawatan utama dalam seluruh Kumpulan Tan Chong berbanding dengan penentang-penentang dan pempetisyen pertama masih merupakan penandatanganan cek. Kegagalan pempetisyen untuk memaklumkan perkara ini dan majoriti mereka dalam Lembaga Pengurusan syarikat tersebut berjumlah kepada penyalahgunaan proses (lihat ms 238F–239A).
- (7) Memandangkan hasrat mereka untuk ‘melepaskan’ diri mereka daripada kedudukan mereka, ia menghairankan bahawa para pempetisyen telah bertindak dalam cara yang luar biasa kepada tawaran penentang untuk membeli saham-saham mereka pada harga pasaran adil, dan memandangkannya sebagai ‘menjijikkan’ dan ‘menghina’ dan lain-lain. Mahkamah memerhati bahawa oleh kerana para pempetisyen kelihatan bersedia memutus hubungan dengan penentang-penentang, jualan penyerahan saham merupakan salah satu cara memastikan bahawa mereka tidak ‘locked-in’. Menolak tawaran penentang merupakan satu perkara, tetapi untuk kemudiannya membuat tawaran balas membeli

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- A** saham-saham penentang macam mana pun menonjolkan suatu motif di sebaliknya. Adalah juga aneh bahawa para pempetisyen mendapati apa yang dibuat oleh mereka adalah kelakuan yang boleh diterima sedangkan itulah yang mereka tuduh penentang lakukan (lihat ms 239B–C).
- B** (8) Tidak boleh dibayangkan bagaimana pempetisyen pertama boleh mula menjustifikasikan bahawa para pempetisyen telah ditindas dan tidak dibenarkan menyertai hal ehwal syarikat penentang kesembilan sedangkan para pempetisyen dan beberapa ahli keluarga mereka terlibat secara aktif dalam pengurusan syarikat penentang kesembilan (lihat ms 239F–G).
- C** (9) Pada hakikatnya, apa yang didapati sukar diterima oleh penentang pertama adalah bilangan undi yang tidak mencukupi. Justeru itu, satu-satunya aduan adalah bahawa penentang-penentang berada dalam kawalan sebenarnya disebabkan milikan saham kolektif mereka, walhal pempetisyen tidak, dan hakikat ini menjelaskan tujuan petisyen tersebut. Tumpuan kerunsingan pempetisyen pertama pada tradisi dan peristiwa lalu bercanggah dengan sistem urusan perniagaan yang praktikal dan pragmatik masa kini. Sebagaimana yang jelas, pengemukaan satu petisyen penggulungan merupakan satu perkara yang amat serius. Dalam keadaan ini, mahkamah berpandangan bahawa sekiranya ia boleh ditunjukkan petisyen tersebut tidak boleh dipertahankan biarpun pada tahap interlokutori, mahkamah tidak harus membiarkannya begitu sahaja, tetapi sebaliknya harus membatalkannya secepat mungkin (lihat ms 239H–240A).]
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## **F Notes**

For cases on just and equitable grounds, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 887–915.

## **Cases referred to**

- G** *A Company, Re* (1983) BCLC 701 (folld)  
*Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 (refd)  
*Active Timber Agencies Pte Ltd v Allen & Gledhill* [1996] 1 SLR 478 (refd)
- H** *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 (refd)  
*Charles Forte Investments Ltd v Amanda* [1964] 1 Ch 240 (folld)  
*Chung Khiaw Bank Ltd v Tio Chee Hing* [1987] 2 MLJ 701 (refd)  
*Dato' Ibrahim Hj Ismail & Anor v Onstream Marine & Ors* [1998] 4 MLJ 86 (refd)
- I** *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 (refd)  
*Kok Fook Sang v Juta Villa (M) Sdn Bhd & Ors* [1997] 2 MLJ 666 (refd)

*Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 789 (refd) A

*Lo Siong Fong, Re* [1994] 2 MLJ 72 (refd)

*Semantan Estate (1952) Ltd, Re* [1962] MLJ 285 (folld)

*Sin Lee Sang Sawmill Sdn Bhd, Re; Leong Thong & Anor v Chong Thim & Ors* [1990] 1 MLJ 250 (refd)

*Ringtower Holdings Ptd* (1988) 5 BCC 82 (refd) B

*Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509 (refd)

*Suppuleetchumi v Palmco Bina* [1994] 2 MLJ 368 (refd)

*Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769 (refd)

*Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 (refd) C

### Legislation referred to

Companies Act 1965 s 218(1)(i)

Rules of the High Court 1980 O 18 r 19(1), (a), (b), (d)

Companies (Winding up) Rules 1972 rr 26, 30(1), (2) D

*Cecil Abraham* (MK Yee and Walter Pereira with him) (*Kamarudin & Partners*) for the petitioners.

*Lim Kian Leong* (Low Chin Cheng with him) (*Lim Kian Leong*) for the respondents. E

**Zainun Ali J:** At the outset, it is observed that the respondent's application to strike out the petition and the affidavits in support thereof have ventured into areas which would require this court to make an optimum evaluation of the claim where the merits of the case would fall to be considered. This, the court cannot do. F

It brings forth the principle laid down in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, which exhorts that when recourse is made to summary process under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC'), the power of the court does not extend to examining the documents and facts of the case in minutiae, just so that the court can decide whether the party has a cause of action or a defence. G

The court went on to state that summary procedure can only be had, when it can clearly be seen that a claim or answer is, on the face of it, 'obviously unsustainable'.

Given this exhortation and mindful of the need to be sparing in the exercise of the court's power, this court then proceeded to consider the instant application. H

In reading the capacious amount of material before this court, it is completely in order for this court to submit the evidence before it, to critical examination as manifested in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 (Privy Council) and the later decision of *Suppuleetchumi v Palmco Bina* [1994] 2 MLJ 368. I

A The opening passage in *Tractors* for instance, states that the power to dismiss an action summarily without permitting the petition to proceed to trial is a drastic power. It should be exercised with the utmost caution.

However, the Privy Council in that case added that in refusing to submit the evidence to critical examination, the Federal Court, erred in law.

B Then, in the case of *Chung Khiaw Bank Ltd v Tio Chee Hing* [1987] 2 MLJ 701, it was stated that in determining whether proceedings were vexatious, the court must look at the whole history of the matter, not solely whether the pleading had disclosed a cause of action.

C Thus it is clear that this court can have a critical evaluation of the evidence, in determining whether the petition discloses a reasonable cause of action or whether the petition was mala fide and hence an abuse of the court process.

In the instant petition, the petitioner had sought to wind up the ninth respondent company pursuant to s 218(1)(i) on the 'just and equitable' ground.

D The issue of whether a company should be wound up is a question of fact, to be decided in each case, in the light of certain general principles. In this case, the petitioners sought equitable relief and the petition is premised primarily upon a breakdown in the relationship of mutual trust and confidence between the two factions, ie the respective families of both the petitioners and the respondents.

#### *The background*

F It might be said that with a petition which ran into 166 paragraphs, with an almost equal or more amount of material in the affidavits filed herein, this court cannot help but be completely appraised of the antecedent of this matter.

Tan Chong & Co was founded in the early 1930's by Tan Chong who is the patriarch of the Tan Chong Family, as a sole proprietorship.

G It was in or around 1946 that the partnership of Tan Chong and Co ('TC & Co') as food supplier was founded, where the partners in the business of TC & Co were Tan Chong, the first petitioner (who is the eldest son) and Tan Sri Tan Yuet Foh (who is the father of the first respondent).

During much of the decade and thereafter, the business flourished and the company diversified into the car distributorship business, dealing with Nissan and Datsun vehicles.

H Then on 16 February 1959, Tan Chong & Sons Motor Co Sdn Bhd ('TCM') was incorporated, where the Tan Chong siblings were the subscribers and directors.

TCM therefore handled the motor business whilst the food supply business remained with TC & Co.

I According to the first petitioner in his petition, much of the business of the two companies were conducted informally and on a consultative basis among the family members.

The car business expanded and saw remarkable forays into other areas such as car rentals, distribution of commercial vehicles and industrial equipment, and tour and travel services, which necessitated the incorporation of the companies for these purposes.

A

The expansion of the business in Malaysia also saw a parallel expansion regionally, when in 1966, Tan Chong & Sons Motor Company (Singapore) Pte Ltd ('TCCS') was incorporated and in 1968, Singapore Automotive Industries Pte Ltd ('SAI') was acquired.

B

With the expansion of TCM's business in Malaysia and Singapore, the younger generation of the Tan Chong family were invited to join TCM and to assist the founding members with running the company.

C

The expansion of the business led to the natural progression of the company going public. However, to ensure that the Tan Chong family would remain in control of the business, the company's financial advisor advised that this could be achieved if the Tan Chong family held a controlling block of shares in the newly incorporated public listed company where the shareholders of the investment holding company would comprise entirely of the members of the Tan Chong family.

D

This would essentially enable the Tan Chong family members to be majority shareholders in the public listed company.

Thus, Tan Chong Motor Holdings Bhd ('TCMH') was incorporated on 4 October 1972, first as a private company and subsequently converted into a public company on 1 September 1973.

E

TCM and all its subsidiary/associated companies and businesses were then wholly acquired by TCMH.

The ninth respondent, ie Tan Chong Consolidated Sdn Bhd ('the company') was thus incorporated on 7 June 1973 as the investment holding company, formed for the purpose of holding the Tan Chong family's controlling block of shares in TCMH. All the shareholders of TCMH became shareholders in the company in exchange for their shares in TCMH.

F

The first subscribers and directors of the company were Tan Yuet Foh and the first petitioner. Form 24 of the company, as at 16 June 1973, denotes the 50:50 shareholder of both families (annexure B).

G

From the records before this court, as at exh THC-18, it would be seen that on 16 June 1973, the ninth respondent company resolved to purchase 9,230,000 shares of RM1 each in TCMH (which was later converted into a public company and listed on 4 February 1974) out of which 5,115,000 shares were purchased from Tan Yuet Foh and 4,115,000 shares were purchased from the first petitioner.

H

Out of the 9,230,000 shares in TCMH which were purchased by the ninth respondent company, 55.417% came from Tan Yuet Foh and 44.583% came from the first petitioner.

I

On 28 August 1974, the ninth respondent company allotted for cash 3,230 shares of RM1 each of which 1,115 in total were issued to members

**A** of the first petitioner's family and 2,115 were issued to members of Tan Yuet Foh's family.

After the allotment on 28 August 1974, Tan Yuet Foh's family owned a total of 5,115 shares in the ninth respondent company and the first petitioners family owned a total of 4,115 shares in the ninth respondent, ie in the ratio of 55.417% held in Tan Yuet Foh's family and 44.583% held by the first petitioner's family.

**B** The proportion of 55.417% and 44.583% was maintained from 28 August 1974 until the present day.

The ninth respondent company and the related companies continued to flourish.

**C** When Tan Yuet Foh passed away on 8 October 1985, his eldest son, the first respondent (Tan Heng Chew), took over his role as head of the (Tan Yuet Foh's) family.

Both sets of families (the first petitioner's and the first respondent's) continued to work and existed side by side in the family company.

**D** Further developments in the family business saw efforts made by the first petitioner and first respondent to reorganize the family business, ie the de-merger of TCMH into diverse activities so as to rationalize operations.

This huge corporate exercise was to restructure the TCMH Group in Malaysia into three public companies namely, TCMH, Warisan and APM, all of which were to be listed on the First Board of the Kuala Lumpur Stock Exchange ('KLSE').

**E** TCMH was then divided into three main divisions:

- (i) the motor and truck division;
- (ii) the auto parts division; and
- (iii) the non-motor division.

**F**

The reorganization will see TCMH divesting itself of the companies in the auto parts and the non-motor division to their own listed holding companies, namely APM Automotive Holding Bhd ('APM') and Warisan TC Holdings Bhd ('WTCH') respectively.

**G**

To retain control of the above demerged vehicles, the company will acquire a direct interest of 22.64% in APM and 22.64% in WTCH respectively.

**H**

In addition, the company will also acquire an indirect interest of another 20% in APM and 20% of the issued share capital of APM and WTCH.

The de-merger exercise had taken months to structure. Just before the EGM of 11 September 1999, it had then reached a crucial point where the company ('the ninth respondent') as the single biggest shareholder in the TCMH Group was required to confirm its participation.

**I**

But things were brewing underneath the familial surroundings, culminating in a 'stand-off' between the first petitioner and the first respondent.

*The petitioner's case***A**

The averments of the first petitioner suggest that the management style of both he and the late father of the first respondent (Tan Sri Tan Yuet Foh) had always been on a consultative basis; that both he and Tan Yuet Foh had enjoyed an amicable relationship based on mutual trust and understanding.

However the management style of the first respondent apparently ruffled the first petitioner's feathers.

**B**

According to the first petitioner, some important business decisions were made by the first respondent without his prior knowledge and approval.

These included:

**C**

- (i) the Nissan diesel joint venture in China;
- (ii) the Subaru joint venture in China; and
- (iii) the purchase of office space in Hong Kong

When confronted by the first petitioner, the first respondent apparently responded that he would consult the first petitioner on future investments.

**D**

According to the first petitioner, the first respondent also made one other business decision in early 1999, that of increasing his own and his brother's salaries, without first consulting him.

The first petitioner then met with the first respondent and voiced his concern on the first respondent's failure to consult him and reminded him of the company tradition of prior consultation before making any major decision.

**E**

The first petitioner, at para 102 of his petition, averred that the first respondent 'appeared receptive' to his concerns, and that he promised that he would consult the first petitioner in future before making any major decisions with regard to the business, salaries and promotion of the company.

**F**

Upon reading the petition, this court finds that the most important provision and perhaps the lietmotif of the petition lies in the averments made by the first petitioner in para 103, which reads as follows:

**G**

103 I then realized that THC (Tan Heng Chew) was determined to disregard my views and his promises of keeping to the spirit of our family's consultative style of management rang hollow. The possibility of the business breaking up in the future in light of THC's (Tan Heng Chew) recent behavior became real. For the first time since I gave my 5% stake in the company to TYF (Tan Yuet Foh), I started to worry about my family's possible position as 'minority' shareholders in the company and the fact that I am now in the twilight of my life and should resolve this matter soon. I was advised by my solicitors that one way I could protect my family's possible position as minority shareholders in the company would be to procure a winding up of the company and by so doing allow the two families to hold shares directly in TCMH in their own respective capacities. In this way, my family's shareholding would not be locked in within the company and we would not be placed in a vulnerable position of minority shareholders.

**H****I**

**A** According to the first petitioner, since at that moment in time, both he and the first respondent were looking at a major reorganization of the business, ie the de-merger exercise, he thought it was the opportune moment to approach the first respondent regarding his proposal to wind up the company (as reflected in para 103 of the petition).

**B** They met on 25 June 1999 and first petitioner explained that such a step was essential as the mutual trust and confidence that had existed between him and the first respondent had been whittled away, given the first respondent's decisions adverted to earlier, which ignored discussions and consultations with him.

**C** The first petitioner averred that the first respondent was not receptive of his proposal on the ground that this corporate move to wind up would complicate the ongoing de-merger exercise, which had taken months to prepare.

**D** The first petitioner and the first respondent met again on two more occasions to discuss the restructuring of the company, but nothing came from it until a meeting of 10 August 1999 where first petitioner and first respondent met, together with two independent directors of TCMH to discuss these areas of concern.

After a discussion, according to first petitioner, a draft memorandum of intent was prepared.

**E** According to the first petitioner, the said memorandum of intent was drawn up to ensure that despite the proposed restructuring of the business, the shares held by the members of the families will be split into two groups instead of being held under one company, and that the two families would continue to jointly control the Tan Chong Group and cooperate with each other in the administration and operation of the business (see para 117 of the petition).

**F** A meeting was arranged between the first petitioner and the first respondent on 24 August 1999, where the first respondent indicated his disagreement with the first petitioner's proposal.

**G** Subsequently an extraordinary general meeting was held on 11 September 1999 ('the 11 September EGM'), to formally approve the de-merger exercise. In what is seen as a diabolical twist, the first petitioner caused a letter to be issued prior to the EGM, which in essence said that the petitioners will only sign the de-merger proposal if their proposal to restructure the company is acceded to (see letter dated 7 July 1999). In short, the EGM ended in a fracas.

**H** One of the banes of the first petitioner is that the first respondent wanted to vest in himself the sole signatory of documents pertaining to the de-merger exercise.

**I** According to the first petitioner, although he requested that he be made co-signatory, this was not acceded to. The resolutions on the de-merger were put to the vote, and the votes were counted in accordance with the shareholdings of each shareholder, and as the first respondent's family

shareholding is collectively 55% of the total issued shares in the company, the first four resolutions were passed with 55% in favour. **A**

In the words of the first petitioner, the said 11 September 1999 meeting marked a 'watershed' in the relations between the two families and that 'the breakdown of mutual trust and understanding was now complete' (para 132 of the petition). **B**

The months following the 11 September meeting saw a catalogue of ills, which the first petitioner attributed to the first respondent.

A meeting was held on 2 December 2000 between the two families (though the first respondent was not in attendance) and it was resolved that the mechanics of splitting the company would be taken up again, but ensuring that the family control of the Tan Chong Group of Public Companies would be maintained. **C**

According to the first petitioner, a proposed head of agreement was drafted, to be discussed and agreed upon by both families (Annexure E).

Then on 5 April 2001, the first respondent responded by making an offer to the first petitioner's family to buy their shares at market value (see Annexure F). **D**

The first petitioner was outraged by this audacity and averred at para 160 of the petition that he was 'greatly offended'. The first petitioner also averred that the offer was 'meant to insult'. **E**

The first petitioner then, through his solicitor, made a counter offer to buy the first respondent's shares, without conditions (Annexure G).

The first respondent declined the offer through his solicitor's letter of 3 May 2001 (Annexure H).

In the circumstances, the first petitioner found it just and equitable to wind up the company pursuant to s 218(1)(i) of the Companies Act 1965 ('the Act') on the 'just and equitable' ground; hence the petition was filed on 2 May 2001. **F**

#### *The first respondent's case* **G**

The other side of the great divide saw the first respondent filing an application to strike out the petition under the provisions of O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980, on the grounds, inter alia, that it discloses no reasonable cause of action or is frivolous or vexatious or an abuse of the process of the court, and/or under the inherent jurisdiction of the court, on the grounds that it is an abuse of the process of the court, and that the costs of the application be borne by the petitioners. **H**

The grounds of this application are that there exists no reasonable cause of action and/or is an abuse of the process of the court as contained in the affidavit by Dato Tan Heng Chew affirmed on 15 June 2001.

Since the antecedents of the Tan Chong conglomerate has been dealt with above, the first respondent's case shall begin with events prior to the 11 September 1999 EGM. **I**

**A** Based on the registered shareholdings, the petitioners hold collectively approximately 44.6% and the first to eighth respondents hold collectively approximately 55.4% of the total issued shares of the ninth respondent company.

**B** The company is the largest (but not the majority) shareholder in the four public listed companies, ie TCMH (45.28%), Warisan (43.64%) APM (42.64%) and TCIL (45.28%) and is generally recognized as having effective control of those companies.

**C** Since the death of Tan Sri Tan Yuet Foh ("TYF"), the first respondent's father in 1985 until August 2000, the shareholders of the company had seven directors, ie the first, second, third and fourth petitioners and the first, second and fourth respondents, to manage the affairs of the company, in the interests of all the shareholders.

It is the first respondent's case that from 1985 until 25 August 2000, the first to fourth petitioners as the majority on the board actually had the ability to control the day to day affairs of the company.

**D** It is also the first respondent's case that as the respondents held a minority on the board of directors of the company, they could not possibly manage or conduct the company in its daily affairs detrimental to the interests of the petitioners. In any case, the first respondent stated that it is a pertinent point that despite the apparent acrimony, the board of directors of the company had, on 10 May 2001, unanimously agreed to authorize the fourth respondent to be its proxy to vote to reappoint the first petitioner as a Director of TCMH, APM and Warisan, notwithstanding that the first petitioner is now more than 70 years old (see board resolution, exh THC-8).

**F** The first respondent noted, not without a touch of irony, that despite the announcement of the filing of the petition to the public on 24 May 2001, the first petitioner was duly reappointed a Director of APM on the same day and Director of Warisan and TCMH on the following day, ie 25 May 2001.

**G** The second petitioner was also reappointed as director of TCIL on 22 May 2001 (see exh THC-9).

In view of the above, it is the first respondent's case that the allegations of breakdown of mutual trust and understanding arising from his (first respondent) conduct is without basis and justification.

**H** The first respondent went on to state that the infamous 11 September 1999 EGM was called for a specific purpose, ie to approve the company's participation in a huge corporate exercise (de-merger) to restructure the TCMH Group in Malaysia, as was known to the petitioners. The first respondent stated that he was the sole signatory to the de-merger exercise so as to expedite the corporate exercise.

**I** In any case, even if the first petitioner was made co-signatory, the de-merger might have been impeded, since the first petitioner had already intimated that the petitioners will agree to the de-merger only if the respondents agree to wind up the company.

By so holding the company to ransom, the first respondent felt it would be difficult for the de-merger exercise to proceed should the first petitioner be made co-signatory. **A**

The first respondent stated that somehow the first petitioner had slanted the fact and circumstances leading to and surrounding the EGM, giving it a sinister twist. **B**

The de-merger had been structured in order to split the TCMH Group in Malaysia into three public companies namely TCMH, Warisan and APM, all of which were to be listed on the First Board of the KLSE. **B**

The de-merger exercise had taken a lot of time to plan and structure. At that particular time, it had reached a crucial point where the company, as the single biggest shareholder in the TCMH Group, was required to confirm its participation, and as if on cue, it was during these critical moments that the first petitioner had indicated his desire to wind up the company (see paras 107 and 108 of the petition). **C**

It is noted also that at the relevant time the first, second, third and fourth petitioners constituted four out of seven members of the board of directors of the company and so their consent was necessary for the board resolutions to be passed to approve the company's participation in the de-merger exercise. **D**

But when a circular resolution was given to the directors of the company to sign to proceed with the de-merger exercise, the first, second, third and fourth petitioners refused to sign the document. **E**

Their refusal meant that the company could not proceed with its participation in the de-merger exercise, unless an EGM was called for the shareholders to approve the exercise. A copy of the circular resolution which the first to fourth petitioners refused to sign is attached as exh THC-2. **F**

The delay in obtaining the signatures of the first to fourth petitioners caused concern to the merchant bankers and company secretary for the de-merger exercise — (see the letters dated 25 August 1999, 27 August 1999 and 9 September 1999 explaining their concern (see exh THC-3)). **F**

The petitioner's refusal to approve the de-merger would mean that it would be called off and the losses to the shareholders of the TCMH Group would have been immense. Exhibit THC-4 (attached), which is the independent advice from Malaysia International Merchant Bankers shows the details of the de-merger exercise, demonstrating the clear benefits it would give shareholders. As could be seen, the post de-merger value of the Group (TCMH, APM and Warisan) increased by approximately RM674,680,000 (including cash benefits paid to shareholders). **G**

On the downside, if the de-merger exercise is aborted due to the petitioner's refusal to participate, the company may well be faced with hefty damages. **H**

These serious consequences were apparently quite lost on the first petitioner, who patently refused to sign the de-merger. As had been stated earlier, just prior to the EGM, the first petitioner wrote to the company on 7 September 1999 to state that he and his family would only agree to vote **I**

**A** in favour of the resolutions at the EGM if the parties concurrently proceeded with a restructuring of the company along the lines of the memorandum of intent whose terms included liquidation of the company and joint management of the group.

**B** As stated by the first respondent, in effect, the first petitioner was 'threatening to derail the entire de-merger exercise if the respondents do not agree to wind up the company, (see first petitioner's letter and memorandum exh THC-6).

Thus the EGM was therefore necessary to pass the resolutions and because of the greater number of petitioners in the company, it was felt that it would have been necessary for the votes to be counted by poll.

**C** And so the EGM came to pass, where in view of the majority holding held by the respondents, voting was made in favour of the de-merger.

**D** It is the first respondent's case that it was after the de-merger that Tan Chong Group embarked upon a concerted effort to upgrade the professionalism and transparency of its management processes. Under the guidance of the boards of the various companies, their aim was to increase professionalism and to put in place aspects of corporate governance. These new measures caused tensions, as resistance to change is naturally inherent.

**E** It is the first respondent's case that the fourth and fifth petitioners have characterized every change in management procedures as a personal attack by the first respondent, resulting in a prolific exchange of letters of complaint to the first respondent.

Though the first respondent tried to explain their corporate vision to the fourth and fifth petitioners, they spurned these explanations as being cynical and insincere.

**F** The problems attributed to the first respondent escalated after the EGM, culminating in the first petitioner filing a petition and the first respondent filing a notice of motion on 15 June 2001 to strike off the petition.

The first respondent's application is premised on 16 grounds and may be summarized broadly as follows:

- G**
- (a) technical and/or procedural objections (grounds (a) to (c));
  - (b) the petition does not disclose any reasonable cause of action (grounds (d) and (e));
  - (c) allegations pertaining to the merits of the petition (grounds (f)-(m));
  - (d) the conduct of the petitioner after filing the petition (grounds (n)-(o)).
- H** (See attached grounds (Annexure f).)

*The technical objection*

**I** The first ground raised by the respondent that the petition was wrongly intitled had been dealt with and has since become academic. The petitioners obtained leave of court on 20 July 2001 to include the intitlement to reflect the specific provision under which the petition was brought.

The second procedural objection relates to non-compliance with the Companies (Winding up) Rules 1972 ('the Rules'), since rr 26, 30(1) and 30(2) expressly provide that the petition should be verified by the affidavit verifying petition in the prescribed form.

A

However, since there is no express prohibition in the Rules against the filing of affidavits, parties are at liberty to file affidavits to support the petitions to prove their allegations. In any case, parties are at liberty to file further affidavits in support of or in opposition to the petition. Hence, the Rules should be construed in a permissive rather than in a prohibitive manner, as decided in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 789.

B

Thus, this court finds that this ground must fail.

C

The third procedural objection says that there is no provision in the Act, or the Rules to claim against the first to eighth respondents, since the only remedy sought is winding up of the ninth respondent. However, this court takes the same approach as that of the court in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417, *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 and *Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769.

D

This is so since the petition is premised on allegations made by one faction (the petitioners) against the other faction (the first to the eighth respondents). Thus the first to eighth respondents are proper parties to this action as they would be directly affected by the allegations and the relief sought.

E

Before embarking into the other areas of the grounds for striking out, it bears emphasis that in determining whether the proceedings are vexatious, frivolous or an abuse of process, the court must look at the whole history of the matter before it, not solely whether the pleadings have disclosed a cause of action. This principle is clearly laid down in *Chung Khiaw Bank Ltd v Tio Chee Hing* [1987] 2 MLJ 701.

F

In an earlier English decision, *Re Vernazza* [1959] 1 WLR 622, Lord Parker LJ stated that:

G

The question whether proceedings instituted by the respondent are determined solely by inspecting the document initiating the proceedings to see whether it discloses a cause of action; the court must have regard to the whole history of the matter, as it does, when an application is made to strike out a pleading under the inherent jurisdiction.

H

In a decision of the High Court of Singapore in 1996, ie *Active Timber Agencies Pte Ltd v Allen & Gledhill* [1996] 1 SLR 478, it was held that in an application to strike out a statement of claim on the ground that it was frivolous and vexatious, the court was entitled to and ought to look at the whole history of the matter. In such an application, the court in its inherent jurisdiction was entitled to look at the affidavits as to the history of the matter, and if in the light of the history, the action was vexatious, the pleading could be struck out and the action dismissed.

I

**A** Thus fortified, this court proceeded in making a critical evaluation of the evidence on the affidavits before it, to determine whether the grounds as asserted by the respondents are justified, bearing in mind the principle that at the striking out stage, it is not concerned with the respective merits of the claim.

**B** The powerful statement made by the court in *Maril Rionebel (M) Sdn Bhd v Perdana Merchant Bank Bhd* [2001] 3 AMR 29 looms large in the petitioner's stance, in that the application to strike out manifests the abusive nature of the respondent's application.

**C** However, this court finds that even if striking out applications are frowned upon for holding up the hearing of the petition itself, this court finds that the judicial concern in that case was up against an entirely different set of facts and could therefore be distinguished from the instant case, as authorities such as *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509 would have shown.

**D** Thus, given the authority in *Si & Si* and others such as *Dato' Ibrahim Hj Ismail & Anor v Onstream Marine & Ors* [1998] 4 MLJ 86, as well as the English case of *Re A Company* (1983) BCLC 701, this court's jurisdiction in striking out a petition such as the present was never in doubt.

**E** The petition which is premised on the 'just and equitable' ground requires this court to examine the petition and affidavits before it, since what is 'just and equitable' in a case must depend on its particular facts.

**F** Since these expressions are of the widest importance, they ought not to be cribbed, cabined and confined by the creation of categories within which a case must be brought, in order that it will be held to be 'just and equitable' that a company be wound up.

**G** Thus, mindful of the legal principles and the court's constraints in this application, this court then proceeded to consider the matter by reading the petition itself and the affidavits in support therein, to ascertain, based on these documents, whether the allegations of the petitioner have any basis and whether this court could exercise its power to strike out the petition.

**H** The power of the court to strike out a petition to wind up a company lies in its inherent jurisdiction and not in O 18 r 19 RHC, although judicial differences have been expressed over this legalese. However, there is much to be said for the court's decision in *Re Lo Siong Fong* [1994] 2 MLJ 72 on this point; thus this court agrees that this court has inherent jurisdiction to strike out a petition that amounts to an abuse of the court's process.

**I** A close perusal of the petition and the numerous averments in the body of the petition and evidence of allegations are already before this court and adverted to earlier, are to be considered now.

As could be ascertained from the court records, there were two significant events before the 11 September EGM which led to this unhappiness, and they are that:

**I** (i) the first respondent made decisions on the Nissan JV in China as well as the Subaru JV and purchase of office space in Hong Kong. All these decision were taken without consulting the first petitioner;

(ii) the first and second respondent increased their salaries without consulting the first petitioner and that his son's salaries were not increased.

A

The first petitioner had then approached the first respondent before the 11 September EGM and broached the subject (of winding up).

It is imperative for this court as a court of equity, to subject the exercise of legal rights to equitable considerations, that is of a personal character arising between one party and another which may make it inequitable to assert on legal rights or to exercise them in a particular or specific way.

B

The most singular, significant paragraph in the entire petition is found at para 103 of the petition.

C

This paragraph has been quoted above and it takes a little more than a normal conviction to assert that it leads to a manifestation of the first petitioner's real intention. Even objectively, it could be viewed that the intention seems to be that the first petitioner's side of the family is not to be sidelined in the 'Tan Chong scheme of things'.

D

As the evidence has shown, the first petitioner harboured feelings of disquiet against the first respondent. This feeling fermented into what appeared to be an intense pique even before the 11 September EGM.

The first petitioner's subsequent complaints, when viewed in his failed attempt to make the first respondent agree to winding up, could be seen to be motivated not by the first petitioner's desire to redress the alleged wrongs committed against him and the other petitioners, but by some other reasons best known to himself. As can be seen, the catalogue of complaints of the first petitioner were all against the first respondent (see petition paras 134–152).

E

The statement of the first petitioner at para 103 of his petition is most telling. In the light of the family background, it suggests several factors. The first of it is that his complaints against the first respondent basically stem from the slights (imagined or otherwise) from a brash, younger man.

F

Secondly, the stirrings of disquiet he felt were largely motivated by self-interest and self-preservation and not because there existed a real breakdown of trust and understanding.

G

Thirdly, and more importantly, it could be inferred that all the agitations were excited almost entirely because the first petitioner had already harboured an intention to wind up the company, and thus the failure to convince the first respondent to meet him on his terms (to restructure and split the shares) seemed to seal the fate of the company.

H

It is important to examine whether the complaints of the first petitioner are such that they represent a mere domestic skirmish, which in itself is insufficient to support his allegation, as amply demonstrated in the case of *Dato' Ibrahim bin Haji Ismail & Anor v Onstream Marine Sdn Bhd & Ors* [1998] 4 MLJ 86.

I

The only complaint of the first petitioner against the first respondent before the 11 September EGM are the decisions made on Nissan JV in

- A China, Subaru JV in China, buying office space on Hong Kong and increasing his and the second respondent's salaries without consulting him.

These decisions are all matters which were taken within the legitimate confines of the company even if there was no prior consultation. There is no evidence filed in support to show that first respondent had exceeded his powers for some illegitimate or ulterior purpose (per Haidar J in *Dato Ibrahim Hj Ismail v Onstream Marine SB*).

- B

In fact, this court finds that it is appropriate at this juncture to remind itself of the resonance of the statement of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd and Others* [1973] AC 360 at p 379 who observed that:

- C The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure ...
- D

His Lordship went on to state:

- E ... The 'just and equitable' provision ... does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations that is, of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights or to exercise them in a particular way.

- F Viewed in the light of the above statements, the events leading to the petition would enable the court to subject the exercise of legal rights to equitable considerations.

- G It is apparent that the first petitioner suffered from a bad case of petulance and peevishness. This led to his mulish resistance to agree to sign the circular resolution to approve the de-merger, despite the serious consequences to the company and the shareholders, should it not go through.

- H In this, this court finds that the first petitioner had acted unreasonably, not least when for good measure, an ultimatum was delivered, as when the petitioners indicated they would only sign if the respondents agreed to their proposal to restructure the company which included liquidation and joint management of the group.

- I This wanton conduct smacks of unreasonableness (see *Re A Company* [1992] BCLC 701), since there are other shareholders in the listed company whose interests would be jeopardized in the event the de-merger is aborted. As cases such as *Charles Forte Investments Ltd v Amanda* [1964] 1 Ch 240 and *Re Semantan Estate (1952) Ltd* [1962] MLJ 285, have shown, courts will look askance at situations where careless disregard is shown to the interests of shareholders.

Viewed in its proper perspective, the first petitioner's letter of 7 September 1999 shows just how far the petitioners were prepared to put their own selfish interests to wind up the company ahead of the interests of the TCMH Group and all its public shareholders as well as the interests of the ninth respondent company and its shareholders as a whole.

Thus, bad faith is clearly shown. The complaints of the first petitioner after the 11 September EGM were largely against the conduct of the first respondent vis-a-vis his position in the company. However, they mostly concern management issues relating to the four public listed companies and should be dealt with at the public listed companies' management level (see *Dato' Ibrahim Hj Ismail v Onstream Marine* where the court there held that the proper forum to resolve these issues are the companies themselves). In any case, allegations relating to other companies are irrelevant to justify reasons to wind up a company (see *Kok Fook Sang v Juta Villa (M) Sdn Bhd & Ors* [1997] 2 MLJ 666).

It is obvious that the complaints are exclusively made against the first respondent alone and do not involve the other respondents. In order to support a winding up petition, the petitioners need to show that the relationship between all the shareholders have broken down and not just that they disagree with one or two of them.

The tenacity of the petitioners in wanting a winding up on account of an irretrievable breakdown of 'mutual trust and understanding' between them and the respondents is diluted when in the next minute, the petitioners were heard to have indicated that they have no problem working together with the respondents after the split.

This court has difficulty in comprehending this rather perverse logic, since this translates into a situation where there could not possibly be such an irretrievable breakdown, if the parties could still work together (see encl (25), paras 46, 49, 54 and 59).

This brings the matter to another level and that is, such being the case, there seems to be a collateral purpose and bad faith in the petitioner's petition (*Re Lo Siong Fong*).

What then, could be the 'real' reason for the petition?

In the case of *Re Sin Lee Sang Sawmill Sdn Bhd; Leong Thong & Anor v Chong Thim & Ors* [1990] 1 MLJ 250, it was to teach the respondents a lesson. In the instant case, the petitioners seem determined at all costs to wind up the company, even at the expense of not disclosing to the court the fact that the first to the eighth petitioners all hold senior positions within the Tan Chong Group, including chairmanship of two public listed companies and managing director, deputy managing director and general manager of key subsidiaries.

It is a fact that none of the petitioners have been removed from any executive position. In fact, the petitioners hold more key positions throughout the Tan Chong Group than the respondents, and the first petitioner is still very much a cheque signatory.

**A** The petitioner's failure to disclose these and their majority on the board of management of the company amounted to abuse of process.

One of the reasons advanced by the petitioners to wind up the company was to unlock their minority position (see para 103 of the petition). The actions of the first petitioner from then on was based solely and unflinchingly on this one goal.

**B** Given the desire to 'unlock' themselves from their minority position, it appears mystifying that the petitioners acted in an extraordinary way to the respondent's offer to buy their shares at fair market value, viewing it as 'offensive' and 'insulting' etc.

**C** This court notes that since the petitioners seemed all geared to part company with the respondents, a share buy out would have been one way of ensuring that they were not locked in. Rejecting the respondent's offer is one thing, but to then counter offer to buy the respondents' shares is somehow reflective of an undisclosed motive. It is also strange that the petitioners found it perfectly acceptable conduct for them to do the very thing they accused the respondents of doing.

**D** It is a fact that the ninth respondent company owns shares in TCMH, APM, Warisan and TCIL. Apart from some of the original shares in TCMH acquired by ninth respondent company from the first petitioner and Tan Sri Tan Yuet Foh, none of the shares in TCMH and none of the shares in the other listed companies which are presently held by the ninth respondent company belonged to petitioners, as these shares are the assets of the ninth respondent company.

**E** The ninth respondent is basically a family shareholding company which is a healthy and going concern, and is the de facto controlling shareholder in the four public listed companies, namely TCMH, WTCH, APM and TCIL.

**F** The petitioner's desire to 'restructure' and split the shareholding in the ninth respondent company does not necessarily activate distribution *in specie* and assumptions of owning the shares in the listed companies.

**G** It is inconceivable how the first petitioner could ever begin justifying that the petitioners were oppressed and denied participation in the affairs of the ninth respondent company when the petitioners and several of their family members are actively involved in the management of the ninth respondent company and companies within the Tan Chong Group of companies.

All the shareholders receive dividends every year in accordance with their shareholdings.

**H** None of these facts are denied by the first petitioner. In truth, what the first petitioner finds galling is to be outvoted on most counts.

Thus, the only thorn in the flesh is that the respondents are in effective control by virtue of their collective shareholding, whilst the petitioners are not, and this fact strikes at the very heart of the petition.

**I** The first petitioner's maudlin preoccupation with tradition and remembrance of things past, gets in the way of the practical, pragmatic corporate governance of the day.

As is obvious, to present a winding up petition is a most serious matter.

A

In these circumstances, it is this court's view that if the petition can be shown to be manifestly unsustainable even at the interlocutory stage, the court should not allow it to languish even a day longer, but instead should strike it off as early as possible.

This is certainly a course open to the respondent, and this brings forth the case of *Ringtower Holdings Ptd* (1988) 5 BCC 82, where Peter Gibson J observed:

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Further, I have anxiously throughout borne in mind the cautioning words of Lord Templeman in *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] 1 All ER 19, where he said:

C

'... If an application into strike off involves a prolonged and serious argument, the judge should, as a general rule, decline to proceed with the argument, unless he not only harbours doubt about the soundness of the pleading but, in addition, is satisfied that striking off will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself.'

D

This court took into consideration the petition and the affidavits filed therein, and reading them as generously as is possible in the interests of both parties, it seems to this court that in the circumstances, the first petitioner had well and truly put paid to his expectation that equitable considerations would continue to bind the parties.

E

In any case, this court is satisfied that the petition constitutes an abuse of process for the petitioners to have presented a winding up petition on grounds that have been shown to be unsustainable.

Thus, this court is quite unable to come to the conclusion that the petition discloses any ground for winding up under the just and equitable ground, and in the circumstances, the petition is struck out with costs.

F

*Order accordingly.*

Reported by Loo Lai Mee

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